

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FS:MAN:TL-N-4240-00

JJSweeney

date:

to: [REDACTED], Territory Manager [REDACTED], [REDACTED]
Attn: [REDACTED], Revenue Agent, [REDACTED]

from: Area Counsel (CC:LM:FS:MAN)

subject: Taxpayer: [REDACTED] (U.I.L. #6501.08-10)
EIN: [REDACTED]
Taxable Years: [REDACTED] through [REDACTED]

PROPER PARTY TO SIGN CONSENT FORM ON ASSESSMENT OF INCOME TAX
AFTER MERGER

This memorandum responds to your request of April 2001 for assistance in drafting legally correct language for a Form 872, Consent to Extend the Statute of Limitations on Assessment, ("Form 872"). This memorandum should not be cited as precedent.

We state herein the language for addressing the above taxpayer on the name line of the Form 872 and state who is eligible to sign the Form 872 for the taxpayer. We recommend that you also request for the taxpayer to execute a Form 977 in the capacity of a transferee under I.R.C. § 6901. We discuss actions you should take to ensure that the Form 872 is executed by an appropriate Service official.

Facts

[REDACTED] (" [REDACTED] ") was a banking corporation organized in [REDACTED]. It was a subsidiary of [REDACTED] (" [REDACTED] "), a limited liability company under [REDACTED] law engaged in banking. In addition to banking, [REDACTED] and [REDACTED] performed non-banking activities both inside and outside of [REDACTED] such as asset management, real estate, equipment leasing and investment banking.

From [REDACTED] through [REDACTED] (among other years), [REDACTED] was licensed to conduct banking activities within the United States. Its U.S. operations included a state-licensed branch in New York and a state-licensed agency in Miami, Florida. To report these activities for U.S. income tax purposes, [REDACTED] filed a Form 1120F, Federal Income Tax Return of a Foreign Corporation, ("Form

1120F") for each of the [REDACTED] through [REDACTED] tax years. Because it was a foreign corporation, [REDACTED] could not join a consolidated group for U.S. tax purposes.

In the year [REDACTED], [REDACTED] and [REDACTED] executed a deed whereby [REDACTED] was merged into [REDACTED], and the separate existence of [REDACTED] ceased ("the merger"). To effect the merger, [REDACTED] issued new shares of stock as consideration for the outstanding shares of [REDACTED] stock. The newly-issued [REDACTED] shares were to be delivered to [REDACTED]'s shareholders shortly after the merger.

The taxpayer represented to you various facts about the merger relevant to this request for advice¹. It represents that the merger was effective on [REDACTED], the date the merger deed was filed (presumably with the [REDACTED] government). The taxpayer further represents that in the merger all of [REDACTED]'s assets and liabilities were transferred to [REDACTED] and that these transfers were effected under [REDACTED]². Finally, the taxpayer represents that under the [REDACTED] [REDACTED] assumed all of [REDACTED]'s liabilities as a result of the merger³.

Because of the merger and because [REDACTED] was not licensed to conduct U.S.-based banking activities, [REDACTED] filed an application with the Federal Reserve Bank of New York ("the FRB") to establish the New York branch and the Miami agency that were formerly of [REDACTED]. On [REDACTED], the FRB notified [REDACTED] that its application was approved subject to [REDACTED]'s compliance with commitments stated in its application.

Your division is currently examining the [REDACTED] through [REDACTED] taxable years of [REDACTED]. For [REDACTED]'s [REDACTED] through [REDACTED] taxable years, we understand that a Form 872 was executed to extend the statute of limitations for assessment until [REDACTED]. We further understand that the statute of limitation on assessment has not yet expired for [REDACTED]'s [REDACTED] tax year.

¹As contained in a copy of a "Certificate" signed by [REDACTED]'s secretary that [REDACTED] provided to you.

²[REDACTED] provides that after a merger is registered the absorbed company dissolves and transfers all its rights and obligations to the absorbing corporation. [REDACTED] ([REDACTED]) ([REDACTED]).

³We understand the taxpayer would not provide you a copy of the merger deed or any part thereof, despite our request for it.

You wish to further extend the statute of limitations on assessment for the [REDACTED] through [REDACTED] years and wish to extend the statute of limitations on assessment for the [REDACTED] year. For such purpose, you seek advice on the proper language for a Form 872. The accuracy of our advice is predicated on the accuracy of the above facts. If you should learn that the facts differ from those stated above, you may wish to consult with us concerning this advice.

Law and Analysis

As the statute of limitations on assessment for [REDACTED] s [REDACTED] taxable year has not yet expired, a Form 872 can be executed to extend the statute of limitations on assessment for that year. I.R.C. § 6501(c)(4)⁴. Because you secured a Form 872 for [REDACTED] s [REDACTED] through [REDACTED] returns and because the assessment period stated on the Form 872 (i.e. [REDACTED]) has not expired, you can seek a subsequent extension of the assessment period by issuing another Form 872. I.R.C. § 6501(c)(4). The subsequent extension must be executed before [REDACTED] for the [REDACTED] year⁵. Id.

The issue arising because of the merger is to identify and properly name the entity to be included on the "name" line of a Form 872. Under the merger deed, all of [REDACTED] s assets were transferred to [REDACTED], and the separate existence of [REDACTED] ceased. Thus, [REDACTED] should be the entity to consent to extending the statute of limitations with respect to [REDACTED] s pre-merger tax years. The capacity in which [REDACTED] is eligible to execute such consent should be considered.

[REDACTED] can execute the 872 if it is primarily liable as a successor in interest for [REDACTED] s pre-merger liabilities. See, Southern Pacific Transportation Company v. Commissioner, 84 T.C. 367 (1985). Such liability is, for a domestic corporation, established under state law or as assumed by contract. If [REDACTED] s liability is limited to that of a transferee of [REDACTED] s assets within the meaning of I.R.C. § 6901, however, it must execute a consent in that capacity. The consent form for assessing income taxes against a transferee is Form 977 (Consent

⁴You indicated that [REDACTED] filed its [REDACTED] Form 1120F in [REDACTED].

⁵For purposes of this request for advice, we assume that this prior Form 872 was properly executed. If any issue is raised concerning the validity of the previously-executed Form 872, please contact our office for further advice.

to Extend the Time to Assess Liability at Law or in Equity for Income Gift, and Estate Tax Liability against a Transferee or Fiduciary).

Based on the taxpayer's representation concerning [REDACTED] law, [REDACTED] became liable for [REDACTED]'s debts in some capacity. But because we did not review the merger agreement, we cannot, apart from the taxpayer's representation, render any opinion concerning what the merger deed states with respect to [REDACTED]'s liability for [REDACTED]'s pre-merger debts. Thus, we cannot definitively state whether [REDACTED] should execute a consent form as [REDACTED]'s successor-in-interest or as its transferee. We therefore recommend that you request that [REDACTED] execute both a Form 872 as [REDACTED]'s successor in interest and a Form 977 as [REDACTED]'s transferee.

The language for the name line of the Form 872 should be "[REDACTED] ([REDACTED]), as successor-in-interest by merger to [REDACTED] ([REDACTED])." [REDACTED]'s current address should be added to the Form 872 after you verify it. The remainder of the Form 872 should be completed according to its instructions⁶.

The language for the transferee line on the Form 977 should be "[REDACTED] ([REDACTED])". You should complete the remaining sections of the Form 977 as indicated thereon and show [REDACTED]'s current address. [REDACTED] should be identified as the transferor (on Form 977 (Rev. 2-87), the transferor's name is on the line below the transferee's address line).

The time in which a Form 977 can be executed is covered in I.R.C. § 6901(c) and (d). We recommend, however, that you arrange to have this form executed based on the above-stated periods for executing a Form 872.

A principal officer of [REDACTED] should execute both of these Forms. A principal officer would include a president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer whom [REDACTED] has duly authorized to sign its income tax return. Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

If you have not yet done so, we recommend that you verify

⁶One exception to following the Form 872's instruction is discussed herein concerning the IRS representation to sign the Form. See, infra.

the EIN of [REDACTED] to be shown on these Forms. We are unsure whether [REDACTED] has obtained a new EIN or will use [REDACTED]'s EIN. If [REDACTED] has obtained from the Service a EIN different from that of [REDACTED], that EIN should be shown next to [REDACTED]'s name on the consent forms. [REDACTED]'s new EIN (if any) should be shown in lieu of the EIN indicated for [REDACTED] in our above-recommended language for the consent forms.

With respect to who can execute the consent forms for the Service, your applicable Director of Field Operations can execute them. Although the current forms indicate that the District Director should sign them, those forms do not reflect the Service's recent reorganization. Thus you should replace the District Director title with "Director, Field Operations". In lieu of requesting that your Director sign these forms, you may wish to verify whether the Director's authority to sign them has been redelegated to the managerial level. If you so verify, your group manager can sign these forms.

Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the Form 872. Alternatively, you may advise the taxpayer orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document these actions in your case file.

We further recommend that you pay strict attention to the rules set forth in the IRM that cover how to prepare and execute a Form 872. IRM 121.2.22.3 requires use of Letter 907(DO) to solicit the Form 872, and IRM 121.2.22.4.2 requires use of Letter 929(DO) to return the signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed Form 872 is received from the taxpayer the responsible manager should promptly sign and date it in accordance with Treasury Regulation § 301.6501(c)-1(d). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

If you have any questions concerning the advice provided in this memorandum, please contact John Sweeney at (212) 264-1595, ext. 263.

ROLAND BARRAL
Area Counsel

By: _____
PETER J. LABELLE
Associate Area Counsel